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No. 98-1722

IN THE

Supreme Court of the United States

BAWOL CABIRI and EFUA CABIRI,

Petitioners,

v.

GOVERNMENT OF THE REPUBLIC OF GHANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF STATEMENT OF THE CASE IN OPPOSITION

The petition in the case at bar is grounded upon both a flawed premise and the misstatement of key facts. The chief premise of the petition being that the plaintiff Efua Cabiri's claim, styled as the intentional infliction of emotional distress, arising from an alleged misrepresentation by the defendant Ghana, is excepted under the Federal Sovereign Immunities Act. That is, the petition argues that the defendant Ghana is subject to the jurisdiction of the District Court. The argument postulated in the petition is largely that of the Second Circuit dissenting opinion below. In brief, the dissent would hold that under FSIA Section 1605(a)(5)(B), though misrepresentation is the essence of the plaintiff's claim, and is one of the grounds where sovereign immunity applies, the complaint having been styled as a cause of action for the intentional infliction of emotional distress, immunity therefore is inapplicable. The dissent further postulates that sovereign immunity for misrepresentation applies only where commercial conduct is involved. The language of FSIA Section 1605(a)(5)(B) is analogized to that of the Federal Tort Claim Act Section 2860(h) and the cases thereunder. However, neither the Federal Tort Claims Act, nor the cases cited, apply to the facts in this case. This was the holding of the Second Circuit Majority Opinion below. And, moreover, it is the essence of the claim, not the style of the pleading, which determines the application of sovereign immunity under both the FTCA and the FSIA.

A second premise of the Petition is that the Ninth Circuit case of *Siderman de Blake* applies to the facts here. And also, that the Second Circuit's attack on *Siderman* will result

in "immunizing foreign nations from suit if they engage in offensive use of U.S. Courts". First, the facts in Siderman are not analogous to the facts here, and second, it is respectfully submitted, the Second Circuit Majority correctly perceived the potential for abuse by litigants who will look to *Siderman* to circumvent the otherwise clear application of sovereign immunity under the FSIA.

Finally, the Petition misstates the key facts, most especially, where it alleges that a landlord and tenant proceeding to recover possession of a Trade Representative's residence from the former Trade Representative, so that the new representative could take occupancy, is part of a "scheme" to persecute and torture the Cabiris in the United States. Instead, the Cabiris lived rent-free for well over two years until possession was finally recovered.

In conclusion, the petition for certiorari by the plaintiffs-appellants fails to state an argument premised upon firm legal grounds, nor does it rest on a true and correct statement of the facts, and therefore it should be denied.

POINT I

PURSUANT TO FSIA SECTION 1605(a)(5)(B), THE DEFENDANT GHANA HAS SOVEREIGN IMMUNITY WITH RESPECT TO THE PLAINTIFF EFUA CABIRI'S CLAIM FOR MISREPRESENTATION, EXPRESSLY ACCORDED IMMUNITY UNDER THE STATUTE.

A. Under Both the FSIA and the FTCA The Focus is the Essence of the Claim not the Style of the Pleading: Misrepresentation is Recognized Under The FSIA As Sovereign Immune Conduct.

Under FSIA Section 1605(a)(5)(B) a foreign state possesses immunity for actions which arise out of misrepresentation.[1] In an attempt to avoid the proscription

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1. The text of 28 U.S.C. § 1605(a)(5):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a

(Cont'd)

of the statute, the plaintiff Efua Cabiri has pled her claim as "the intentional infliction of emotional distress" resulting from misrepresentation. The Majority said of this:

> However cast, the wrongful acts alleged to have caused the injury are misrepresentations made to Efua Cabiri concerning her husband's whereabouts.

Majority Opinion below, 165 F.3d at 200.

The dissent on the otherhand, citing *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994), argues simply that the claim of emotional distress does not fall within the definition of torts listed in FSIA Section 1605(a)(5). *See* 165 F.3d at 204.

However, the dissent mistakenly relies on *Truman* where the Fifth Circuit reversed the District Court finding that a claim by a government employee for sexual harassment was not barred by the Federal Tort Claims Act, 28 U.S.C. § 2860(h). This statute employs the same language as FSIA Section 1605(a)(5)(B) with respect to certain torts including misrepresentation. Even assuming that the two statutes can be read the same, which is not the case, (*see* Point IB *infra*), still *Truman* does not apply on

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(Cont'd)

> discretionary function regardless of whether the discretion be abused, or
>
> (B) *any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights.*

the facts. In *Truman* the Fifth Circuit found that the District Court wrongfully dismissed the complaint per FTCA Section 2860(h), the District Court citing slander as a basis of sovereign immunity. The Fifth Circuit also noted that FTCA Section 2860(h) also provides that the U.S. Government may be held liable "if there would have been liability for negligent or wrongful conduct of a private person in accordance with the law of the place where the act or omission occurred." *See Truman v. United States*, 26 F.3d at 594 (5th Cir. 1994). Which is quite different from the FSIA. But putting this difference aside for the moment, the *Truman* case cannot be read to support the proposition proposed by the dissent, that by analogy to the FTCA, the plaintiff Efua Cabiri's claim for the intentional infliction of emotional distress should be permitted under the FSIA. The dissent argues that *Truman* permitted a plaintiff's emotional distress case to go forward notwithstanding the proscription for torts such as "slander", which in *Truman* would otherwise have been the basis for sovereign immunity. However, the Fifth Circuit made it clear that the cause of action for sexual harassment in *Truman* was a claim whose essence arose out of the intentional infliction of emotional distress. In the words of the *Truman* court, the intentional infliction of emotional distress "was essential to the plaintiff's claim". *See* 26 F.3d at 594-595. In this case, the very essence, the very core of the claim by the plaintiff Efua Cabiri, *is for misrepresentation*. That is, the letter she received concerning her husband's whereabouts was alleged by her to be a written misrepresentation of the true facts. Misrepresentation as above mentioned, is one of the express grounds for sovereign immunity per FSIA Section 1605(a)(5)(B). The *Truman* court, and the Majority here quoted above, leave no doubt that in applying sovereign

immunity, the proscription of the statute cannot be circumvented by the styling of the complaint. *See* the Majority Opinion at 165 F.3d at 200 above quoted, and *Truman*, 26 F.3d at 594 (5th Cir. 1994).

Cf. *Block v. Neal*, 460 U.S. 289 (1983), where this Court held that the failure to supervise the construction of the plaintiff's house was the essence of the claim against the government by the plaintiff borrower under the "FmHa" program, not misrepresentation. The court holding that the misstatements "were not essential to the claim". In *Block* sovereign immunity did not apply, therefore the Court affirmed the Sixth Circuit which reversed dismissal of the complaint. *See* 460 U.S. at 297.

In this case misrepresentation is the essence of the plaintiff's claim, and therefore, sovereign immunity applies pursuant to FSIA Section 1605(a)(5)(B). The Majority below should be affirmed through denial of the petition.

B. The FSIA and FTCA while Containing Similar Language on Misrepresentation, Are Far Different in Purpose: Moreover, There is No True Distinction Between Commercial and Non-Commercial Misrepresentation In the Application of Sovereign Immunity Under the Federal Sovereign Immunities Act.

The Federal Tort Claims Act and the Federal Sovereign Immunities Act differ in one fundamental and highly significant way. The enactment of the FTCA is a statute where the U.S. Government has intentionally and expressly given its consent to be sued, waiving its sovereign immunity. *See Truman v. United States*, 26 F.3d 592, 594

(5th Cir. 1994). The FSIA though operating to limit sovereign immunity of foreign states, in no way operates as a consent to be sued. *Cf. Smith v. Libya*, 101 F.3d 239, 242-244 (2nd Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (even acts of terrorism do not establish an intent to be sued or consent to jurisdiction in the United States.) Therefore the analogy between the statutes cannot be taken as a matter of course based solely on the similarity of the language.

Equally germane, the distinction posed by the dissent, applying FSIA 1605(a)(5)(B) immunity to commercially related misrepresentation only is in error. In doing this, the dissent relies on this Court's decision in *Block v. Neal*, 460 U.S. 289 (1983), citing footnote 5 in particular. In the footnote this Court referred to its earlier decision in *United States v. Neustadt*, 366 U.S. 696 (1961), which appeared to distinguish between *negligent* and *intentional misrepresentation* under the Federal Tort Claims Act. "Negligent misrepresentation" it was said in footnote 5, is of a "financial or commercial character." In *Neustadt* it so happened, the claim was in the nature of "negligent misrepresentation" rather than *intentional misrepresentation*. But the Court in *Block* did not say that *Neustadt* stood for limiting the application of sovereign immunity under the FTCA to "negligent misrepresentation" only. The Court in *Block* in fact defined both *negligent* as well as *intentional misrepresentation* as being the same in one fundamental way, both claims have "the communication of misinformation" as their essence. *See Block v. Neal*, 460 U.S. 295-297 (1983). And the *communication of misinformation* is exactly what the plaintiff Efua Cabiri alleges in her complaint. So not only does the analogy between the FTCA and the FSIA rest upon a debatable

premise, but even if the statutes were interpreted as the same, sovereign immunity would nevertheless apply in this case.

POINT II

REGARDING THE NINTH CIRCUIT CASE OF *SIDERMAN DE BLAKE*

A. The *Siderman* Case does not Factually Apply to the Facts in the Case at Bar

The case of *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993), is in no way comparable on the facts to the case at bar. The underlying doctrine enunciated in *Siderman* is that U.S. Courts cannot be used as an instrument of persecution without effecting an implied waiver of sovereign immunity. In *Siderman*, letters rogatory were sought from a United States District Court to serve a subpoena in connection with a sham criminal prosecution in Argentina premised upon anti-Semitism rather than a violation of law by Siderman. In the case at bar, a New York court was used to obtain possession of real property belonging to the defendant Ghana when the plaintiff Cabiri refused to vacate the premises. The bottom line fact is that the landlord and tenant proceeding to evict Cabiri was a lawful process under New York State Law, while the underlying proceeding in *Siderman* was patently unlawful, having made U.S. courts an unwitting accessory via the letters rogatory. In other words, the proper exercise of lawful process to recover real property cannot rationally be seen as comparable to the criminal abuse of process in aid of a sham proceeding in Argentina. The argument in the petition that the Cabiri

family was entitled to live "rent-free" or the defendant Ghana waives sovereign immunity is absurd. (*See* Petition at page 3.) As the Majority below pointed out, "eviction would have compelled the Cabiris to vacate the house in Westbury, not to return to Ghana." *See* 165 F.3d at 202.

B. Notwithstanding the Disagreement Between The Second and Ninth Circuits over the Doctrine Established by *Siderman*, the *Siderman* Case should Be Limited in its Application.

Finally, it is respectfully submitted, that though there may be a disagreement between the Second and the Ninth Circuit over the viability of *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993), the view of the Second Circuit is more correct. This becomes apparent by the very nature of this case and the petition itself, which relies on arguments rejected even by the dissent below, concerning implied waivers of sovereign immunity arising from the lawful exercise of state process. The *Siderman* case, because of its apparent broad principles by which sovereign immunity might be argued to have been waived by implication, invites abusive litigation brought by otherwise disgruntled foreign nationals whose claims have little or no connection to the United States.

CONCLUSION

The petition of the plaintiffs' should be denied as failing to raise appropriate legal issues for resolution by this Court.

Respectfully submitted,

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